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Attorney-Client Privilege - Indiana

State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.

"[T]he essential prerequisites to invocation of the privilege are to establish by a preponderance of the evidence (i) the existence of an attorney-client relationship and (ii) that a confidential communication was involved." *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996). The attorney-client privilege is codified at Indiana Code § 34-46-3-1, which states that attorneys "shall not be required to testify regarding…confidential communications made to them in the course of their professional business, and as to advice given in such cases." Ind. Code § 34-46-3-1(1). The applicability of the privilege must be established on a question-by-question or document-by-document basis. *See Zurich Am. Ins. Co. v. Circle Ctr. Mall, LLC*, 113 N.E.3d 1220, 1230 (Ind. Ct. App. 2018) (citing *Brown v. Katz*, 868 N.E.2d 1159, 1166 (Ind. Ct. App. 2007)); *see also Airgas Mid-America, Inc. v. Long*, 812 N.E.2d 842, 845 (Ind. Ct. App. 2004) (noting the Indiana Supreme Court has held "that it disfavors blanket claims of privilege"). Generally speaking, the "privilege applies to all communications between the client and his attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities." *Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721, 724 (Ind. Ct. App. 1995).

Attorney-Client Relationship

As a preliminary matter, an attorney-client relationship may either by expressly created or implied from the conduct of the parties. *Krieg Devault LLP v. WGTV, LLC*, 206 N.E.3d 1171, 1177 (Ind. Ct. App. 2023). To this point, the creation of an attorney-client relationship does not depend on: (i) the payment of fees; (ii) the formal signing of an employment agreement; or, (iii) the pendency or expectancy of litigation. *See id.; Mayberry*, 670 N.E.2d at 1266. However, the relationship must be consensual and exists "only after both attorney and client have consented to its formation" such that a "would-be client's unilateral belief cannot create an attorney-client relationship." *Krieg Devault*, 206 N.E.3d at 1177 (quoting *Hacker v. Holland*, 570 N.E.2d 951, 955 (Ind. Ct. App. 1991)).

Implied Attorney-Client Relationships

"Attorney-client relationships have been implied where a person seeks advice or assistance from an attorney, where the advice sought pertains to matters within the attorney's professional competence, and where the attorney gives the desired advice or assistance." *Douglas v. Monroe*, 743 N.E.2d 1181, 1184 (Ind. Ct. App. 2001). An important factor in determining whether an implied attorney-client relationship exists "is the putative client's subjective belief that he is

consulting a lawyer in his professional capacity and on his intent to seek professional advice." *Id.* However, courts will also consider other factors in determining whether an attorney-client relationship has been formed, including: (i) whether the attorney declines to file a formal appearance on the putative client's behalf (which cuts against the existence of an implied relationship);[i] and, (ii) whether the attorney identifies themselves to a third-party as the putative client's lawyer (which cuts in favor of the implied relationship).[ii] Notably, an attorney may provide "nominal assistance" to a putative client without creating an attorney-client relationship, provided the attorney does not believe any such relationship existed and took steps to disclaim its existence. *See Kinney*, 670 N.E.2d at 1297 (finding no attorney-client relationship where attorney told putative client he would not represent her, although the attorney helped the putative client answer some written discovery, attended a deposition with her, and secured a continuance on her behalf at a hearing that she was unable to attend).

Creation of Attorney-Client Relationship through Detrimental Reliance

Although uncommon, an attorney-client relationship can be created "by a client's detrimental reliance on the attorney's statements or conduct." *Hacker*, 570 N.E.2d at 956. "An attorney has in effect consented to the establishment of an attorney-client relationship if there is proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it." *Id.* (internal quotations omitted). In order for an attorney-client relationship to be created in this manner, the party asserting its existence must demonstrate either: (1) "a prior, continuous attorney-client relationship" with the lawyer; or, (2) that the lawyer agreed to act on the putative client's behalf in the transaction. *Id.* at 957.

Confidential Communications

Broadly speaking, a communication between attorney and client "is confidential if it occurred during an attempt to procure professional legal aid." *Bassett v. State*, 895 N.E.2d 1201, 1206 (Ind. 2008) (internal quotations omitted). Communications which are considered confidential are not limited to those between only the attorney and client, but also include "communications between attorneys and the experts or investigators they hire on behalf of a client, as well as communications between agents of the client and agents the attorney hires on behalf of a client." *See Witham Mem. Hosp. v. Honan*, 706 N.E.2d 1087, 1090 (Ind. Ct. App. 1999) (noting that, to remain confidential, such communications must still involve the subject matter about which the attorney was consulted and further that the agent must have been retained "for the purpose of assisting the attorney in rendering legal advice to or conducting litigation on behalf of the client"); *Mayberry*, 670 N.E.2d at 1266 (communications made by client to paralegal/office manager asking to "consult an attorney regarding his legal concerns" were confidential and privileged).

However, it is important to note that "not every communication between an attorney and client is deemed a 'confidential communication' entitled to a reasonable expectation of confidentiality. Generally, information with respect to attorney's fees and a client's identity are not protected by the privilege." *Lahr v. State*, 731 N.E.2d 479, 482 (Ind. Ct. App. 2000) (internal citation omitted). Nonetheless, communications regarding the payment of fees may be considered confidential if their disclosure would be tantamount to the disclosure of a confidential communication. *See McClure & O'Farrell, P.C. v. Grigsby*, 918 N.E.2d 335, 343 (Ind. Ct. App. 2009).

Other exceptions to the application of privilege to communications between the attorney and client also exist. For example, "communications intended by the client to be made public are not considered privileged because there is no reasonable expectation of confidentiality surrounding such information." *Lahr*, 731 N.E.2d at 482. Similarly, "communications made within the presence or hearing of a disinterested third person are not protected by the privilege." *Shanabarger v. State*, 798 N.E.2d 210, 215-16 (Ind. Ct. App. 2003). Additionally, communications made between attorney and client "which do not concern the subject matter of the attorney-client relationship" are also not considered privileged. *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995); *see also Hartford Fin. Servs. Group v. Lake Cnty. Park & Rec. Bd.*, 717 N.E.2d 1232, 1236 (Ind. Ct. App. 1999) (suggesting

the privilege does not apply when an attorney is acting in "some other role" aside from a legal advisor, such as giving "simple business advice" to a client).

Who May Assert the Privilege

"The attorney-client privilege protects against judicially compelled disclosure of confidential information regardless of whether the information is to be disclosed by way of testimony or by court-ordered compliance with a discovery request that a party has attempted to resist." *Brown*, 868 N.E.2d at 1166. Accordingly, attorneys shall not be required to testify "as to confidential communications made to them in the course of their professional business, and as to advice given in such cases." Ind. Code § 34-36-3-1(1). That said, Indiana law is well-settled that the attorney-client privilege "belongs to the client, and the client alone, to claim or waive[.]" *See Waterfield v. Waterfield*, 61 N.E.3d 314, 324 (Ind. Ct. App. 2016); *Taylor v. Taylor*, 643 N.E.2d 893, 898 (Ind. 1994) ("This privilege is personal to the client and may be waived or exercised by her alone.").

It should be noted that, in the case of business entities, the attorney-client privilege applies to communications between the entity's employees or agents and the attorney and/or the attorney's agents. *See Witham Mem. Hosp.*, 706 N.E.2d at 1091. In the same vein, the attorney-client privilege applies to communications between state agencies and their attorneys. *See Groth v. Pence*, 67 N.E.3d 1104, 1118 (Ind. Ct. App. 2017).

Finally, where the client has died, the right to assert the attorney-client privilege belongs to the client's personal representative. *Pulliam v. Peconge (In re Estate of Blair)*, 177 N.E.3d 84, 93 (Ind. Ct. App. 2021).

Proving the Privilege Applies

"The burden to prove the applicability of the privilege is on the one who asserts it." *Buntin v. Becker*, 727 N.E.2d 734, 740 (Ind. Ct. App. 2000). Moreover, the "applicability of the privilege must be established as to each question asked or document sought." *Id.* Consequently, "blanket" assertions of privilege are disfavored and will not suffice to block discovery. *See Howard v. Dravet*, 813 N.E.2d 1217, 1221 (Ind. Ct. App. 2004). The evidentiary standard for proving application of the attorney-client privilege is preponderance of the evidence. *Buntin*, 727 N.E.2d at 740.

Duration of the Privilege

"Information subject to the attorney-client privilege retains its privileged character until the client has consented to its disclosure." *Brown*, 868 N.E.2d at 1166. The privilege even survives the death of the client, although the right to then waive it accrues to the client's personal representative. *See Gast v. Hall*, 858 N.E.2d 154, 163 (Ind. Ct. App. 2006); *Buuck v. Kruckeberg*, 95 N.E.2d 304, 308 (Ind. Ct. App. 1950).

Does the jurisdiction recognize/preserve the attorney-privilege for communications among co-defendants in joint-defense or common-interest situations? If so, what are the requirements for establishing two or more co-defendants' communications qualify?

Indiana has adopted the common-interest privilege, "which is an extension of the attorney-client privilege that permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims." *See Zurich*, 113 N.E.3d at 1230 (internal citations omitted). The common-interest privilege operates as an exception to the general rule that attorney-client privilege is waived when privileged information is disclosed to a third party, and therefore "treats all involved attorneys and clients as a single attorney-client unit, at least insofar as a common interest is pursued." *Price v. Charles Brown Charitable Remainder Unitrust Trust*, 27 N.E.3d 1168, 1173 (Ind. Ct. App. 2015). The common-interest applies to both civil and criminal litigation, as well as purely transactional matters. *Id.*

The bounds of the common-interest privilege are "limited to those communications made to further an ongoing

joint enterprise with respect to a common legal interest." *Id.* While, for the common-interest privilege to apply, the parties' interests must align at the time the privilege is asserted, they need not "always coincide in the future[.]" *Zurich*, 113 N.E.3d at 1230.

The common-interest privilege also applies where two or more prospective plaintiffs consult an attorney regarding a common legal problem, even if some of those prospective plaintiffs eventually choose not to join an ensuing lawsuit. *See Corll*, 646 N.E.2d at 725 (noting that, while the prospective plaintiffs' communications with the attorney would be known to each other, they "will of course be privileged in a controversy of either or both the clients with the outside world"). The common-interest privilege further applies to legal memoranda, drafted by one party's attorneys and shared amongst other parties "in order to assist those parties in determining whether to join in [a] lawsuit." *See Groth*, 67 N.E.3d at 1120-21 (noting such a memo is "a communication made to further an ongoing joint enterprise with respect to a common legal interest").

In the context of a joint defense agreement, it has been held that the common-interest privilege "cannot be waived without the consent of all parties to the defense." *See Price*, 27 N.E.3d at 1173.

Identify key pitfalls/situations likely to result in the loss of the ability to claim the protections of the privilege – e.g. failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.

Waiver

The attorney-client privilege may be waived by the client, either expressly or implicitly. *Waterfield*, 61 N.E.3d at 324. Implicit waiver is generally affected when the client "testifies as to a specific communication or offers his attorney's testimony as to that communication," which thereby "waives the privilege against disclosure of the whole of the communication." *Liberty Mut. Ins. Co. v. Blakesley*, 568 N.E.2d 1052, 1059 (Ind. Ct. App. 1991). However, the privilege may also be implicitly waived where:

- There is a knowing failure to safeguard the privileged communications from being made accessible to third parties. *See Bassett*, 895 N.E.2d at 1207-08.
- Similarly, where the otherwise privileged communications are "made within the presence or hearing of a disinterested third person[.]" *Corll*, 646 N.E.2d at 726.
- The "professional integrity of an attorney is attacked by a client," as in this situation the attorney has "a right to defend his conduct as counsel" by being permitted "to fully explain his conduct, including communications made to him by his client." *Logston v. State*, 363 N.E.2d 975, 977 (Ind. 1977).
- There is an inadvertent disclosure of documents privileged as attorney-client communications, although whether a waiver is affected in this situation will depend on ""the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, and an overreaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded with care and diligence or negligence and indifference." *See Buntin*, 727 N.E.2d at 741 (citing *JWP Zack, Inc. v. Hoosier Energy Rural Elec. Coop.*, 709 N.E.2d 336, 342 (Ind. Ct. App. 1999) (internal quotations omitted)); *see also* Ind. R. Evid. 502 (codifying rules for determining whether inadvertent disclosure waives privilege).
- The party seeking to assert the privilege has placed the otherwise protected information "at issue" by making it relevant to the case via their claims or affirmative defenses. *See Waterfield*, 61 N.E.3d at 324-26.

- Solely in the context of wills, the client dies and there is a controversy "concerning the validity of the will or between the claimants under the will[.]" *Brown v. Edwards*, 640 N.E.2d 401, 404 (Ind. Ct. App. 1994).
- Also in the context of wills, where the testator chooses the drafting attorney to act as a witness to the will. *See Pence v. Waugh*, 34 N.E. 860, 863-64 (Ind. 1893).

Crime-Fraud Exception

"An attorney and client may not conspire to commit a crime and then contend that the communications between them as to the conspiracy is privileged. A fraudulent intent as well as criminality of purpose may well remove the veil of secrecy from communications between attorney and client; where an attorney is consulted for the purpose of obtaining advice as to the preparation of a fraud, or in aid or furtherance thereof." *Green v. State*, 274 N.E.2d 267, 273 (Ind. 1971).

In order for the crime-fraud exception to vitiate the attorney-client privilege, the party seeking to defeat application of the privilege must first "make a prima facie showing that a sufficiently serious crime or fraud occurred, and second, must then establish some relationship between the communication at issue and the prima facie violation." *Lahr*, 731 N.E.2d at 483. For the moving party to satisfy the prima facie showing, "the evidence presented must be such that a prudent person [would] have a reasonable basis to suspect the perpetration of a crime or fraud." *Brook v. State*, 221 N.E.3d 1239, 1254 (Ind. Ct. App. 2023).

The crime-fraud exception applies not only to the commission of crimes unrelated to the attorney's representation, but also the fraudulent manufacture of evidence in support of the client's case in which the attorney represents the client. *See Lahr*, 731 N.E.2d at 483-84; *Brook*, 221 N.E.3d at 1254.

Equitable Estoppel

Although rare, at least one Indiana case has held that a party may be prevented from asserting the attorney-client privilege under a theory of equitable estoppel. *See Purdue Univ. v. Wartell*, 5 N.E.3d 797, 806-08 (Ind. Ct. App. 2014). In *Wartell*, a university employed an attorney to investigate the circumstances surrounding a discrimination complaint, which resulted in the attorney-investigator interviewing the complainant, the party who was the subject of the complaint, and several other witnesses. *Id.* at 801-02. The attorney subsequently produced a report regarding his investigation, which the university then withheld from the complainant under assertion of attorney-client privilege, claiming the attorney-investigator had been retained as the university's counsel. *Id.* at 802-03. Finding that principles of equity must look "beneath the rigid rules to find substantial justice[,]" the *Wartell* court found it was unfair for the university to lead the complainant to believe that the attorney was acting as independent investigator while also concealing that he was retained as the university's counsel, such that the university was properly estopped from invoking the attorney-client privilege with respect to the attorney's report. *Id.* at 807-08.

Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.

Application of Privilege to Attorneys' Fees Where Disclosure Would Be Self-Incriminating

In *Boulangger v. Ohio Valley Eye Inst., P.C.*, 89 N.E.3d 1112 (Ind. Ct. App. 2017), the Court of Appeals considered a possible exception to the general rule that information regarding a client's attorney fees is not protected by the attorney-client privilege because the payment of fees is not considered a confidential communication between an attorney and his or her client. *Id.* at 1116. Appellant there argued for an "incrimination" exception to this rule under the Fifth Amendment to the United States Constitution, asking for the attorney-client privilege to apply where "the disclosure of a client's legal fees would result in implicating the client in the very criminal activity for

which she sought legal counsel." *Id.* The *Boulangger* court rejected this argument, adhering to the rule that "only confidential communications are protected by the attorney-client privilege[,]" and further held the Fifth Amendment could not be utilized to prevent production of information regarding the appellant's payment of legal fees. *Id.* at 1118.

Indiana Rule of Evidence 502 (i.e., "clawback")

In 2012, Rule of Evidence 502 was added to address the disclosure of information covered by the attorney-client privilege, whether intentional or inadvertent. Evidence Rule 502(a) states that, when a disclosure is made in a court proceeding which waives the attorney-client privilege, that waiver extends to otherwise undisclosed communication or information only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and, (3) the disclosed and undisclosed communications ought in fairness to be considered together. Ind. R. Evid. 502(a)(1)-(3). In contrast, a disclosure of otherwise privileged information made in a court proceeding does not operate as a waiver when: (1) the disclosure is advertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and, (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Indiana Rule of Trial Procedure 26(B)(5)(b).[iii] Ind. R. Evid. 502(b)(1)-(3).

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[i] *In re Kinney*, 670 N.E.2d 1294, 1297-98 (Ind. 1996).

[ii] *In re Thayer*, 745 N.E.2d 207, 210 (Ind. 2001).

[iii] Which states that if "information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved." Ind. R. Tr. 26(B)(5)(b).